Supreme Court, U.S.
FILED

991628 APR 10 2000

OFFICE OF THE CLERK

No.

In the
Supreme Court of the United States

DARWIN MONTANA,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

PHILLIP A. TURNER, ESQ.
200 West Madison Street
Suite 440
Chicago, Illinois 60606
(312) 899-0009

Counsel of Record for Petitioner

Midwest Law Printing Company/Photex — Chicago — (312) 321-0220

30pp

QUESTION PRESENTED FOR REVIEW

Whether a defendant's Sixth Amendment right to conflict free representation was denied when his counsel provided evidence to the prosecution which was adverse to defendant in order to protect trial counsel's own interest.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 6

CONCLUSION 8

APPENDICES ..... *infra*

TABLE OF AUTHORITIES

Cases: PAGE(S)

Strickland v. Washington,
466 U.S. 668, 104 S. Ct. 2052,
80 L. Ed. 2d 674 (1984) 7, 8

United States v. Fulton,
5 F.3d 605 (2nd Cir. 1993) 7

United States v. McLain,
823 F.2d 1457 (11th Cir. 1987) 7

United States v. Montana,
19 F. Supp. 2d 873 (N.D. Ill. 1999) 1

United States v. Montana,
199 F.3d 947 (7th Cir. 1999) 1

United States v. Register,
182 F.3d 820 (11th Cir. 1999) 7

United States v. Watson,
866 F.2d 381 (11th Cir. 1989) 7

Constitutional Provision:

U.S. Const., Amend VI 2

Statutes:

Title 18, United States Code, Section 2 2

Title 18, United States Code, Section 371 2

Title 18, United States Code, Section 924(c) 2

Title 18, United States Code, Section 2113(a) 2

Title 18, United States Code, Section 3231 3

Title 28, United States Code, Section 1254(1) 1

Title 28, United States Code, Section 1291 3

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Darwin Montana, prays for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for The Seventh Circuit with a timely petition for rehearing being denied on January 18, 2000.

OPINIONS BELOW

The memorandum opinion and order of the United States District Court for the Northern District of Illinois, Eastern Division, *United States v. Montana*, 19 F. Supp. 2d 873 (N.D. Ill. 1999), and the opinion of the United States Court of Appeals for the Seventh Circuit, *United States v. Montana*, 199 F.3d 947 (7th Cir. 1999), are reproduced in appendices A and B, respectfully of this petition.

Petitioner petitioned the United States Court of Appeals for the Seventh Circuit for rehearing and petitioned for rehearing *en banc*. The petitions were denied on January 18, 2000. A copy of that order is reproduced in Appendix C of this petition.

STATEMENT OF JURISDICTION

The opinion and order of the United States Court of Appeals for the Seventh Circuit was entered on December 16, 1999. A petition for rehearing and a petition for rehearing *en banc* were denied on January 18, 2000. This petition for a Writ of Certiorari is filed within 90 days of that order as required by Rule 13(1) of the Rules of this Court. The jurisdiction of this court is invoked pursuant to Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution states the following:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

On March 5, 1998, a federal grand jury sitting in the Northern District of Illinois, Eastern Division, returned a three court indictment charging James E. Dodd (hereinafter "Dodd") and Petitioner Montana with violating the following federal statutes: Title 18, United States Code, Section 371, conspiracy to commit bank robbery; Title 18, United States Code, Section 2113(a), Title 18, United States Code, Section 2, bank robbery and/or aiding and abetting a bank robbery; and Title 18, United States Code, Section 924(c), use of a firearm in a crime of violence specifically, the bank robbery. R. 1, Tr. Vol. 1, p. 270, 277, 279-284.[1]

---

[1] Citations to the record in this petition are designed as R. ___. Citations to the transcript of trial and other proceedings are designated as Tr. Vol. ___, p. ___. Citations to the supplemental record are designated as S. ___.

Petitioner Montana's jury trial began on June 8, 1998. Tr. Vol. 1, p. 4. On June 11, 1998, the jury returned a verdict of not guilty as to count one and guilty as to counts two and three. R. 34, Tr. Vol. 4, p. 312. Petitioner filed post trial motions on June 25, 1998 and supplemented those post trial motions on August 31, 1998. R. 40 and 47. The district court denied these motions in a written opinion on September 11, 1998. R. 50-51. On March 16, 1999, Petitioner was sentenced to a term of two hundred and sixty-two (262) months of incarceration in the custody of the United Stated Bureau of Prisons to be followed by sixty (60) months of incarceration in the custody of the United States Bureau of Prisons. Therefore, the total period of incarceration is three hundred and twenty-two (322) months. The period of incarceration is to be followed by three years of supervised release.

The federal district court had jurisdiction over the case pursuant Title 18, United States Code, Section 3231 and the federal court of appeals had jurisdiction pursuant to Title 28, United States Code, Section 1291.

At trial the following evidence was placed before the jury:

On January 22, 1998, Dodd entered and robbed the Superior Bank, 4001 South Harlem, Stickney, Illinois. Dodd approached a teller, Deborah Schaer, at her teller window and pointed a handgun at her. Dodd then told the teller to give him all of the 100's and 50's. The teller gave Dodd some money. Dodd then demanded that the teller give him the "stacks." The teller gave Dodd additional money, including "bait bills." The teller gave Dodd $2,369.00. After taking the money, Dodd left the bank. (Tr. Vol. 1, p. 20-22, 26-27, 28-31, 41).

Dodd walked out of the bank, walked across the street and entered the parking lot of a nearby Jewel-Osco store. Dodd then entered a car driven by Petitioner Montana. (Tr. Vol. 1, p. 28, 47, 51). A witness saw the car and information regarding the car was ultimately communicated to the Village of Stickney Police Department. (Tr. Vol. 1, p. 28, 58). Approximately five blocks from the bank, a Stickney police officer observed the getaway car and attempted to stop it by turning on the police flashers. (Tr. Vol. 1, p. 59-61). The car then fled. The police officers engaged in a high-speed chase of the car at times reaching speeds of 65 miles per hours through various neighborhoods. Eventually, the car crashed into a porch of a home. (Tr. Vol. 1, p. 61-63). Police officers approached the car. The officers arrested the driver, Petitioner Montana. (Tr. Vol. 1, p. 64). On the rear floor of the back seat of the car, the officers found Dodd and arrested him. On the rear floor of the back of the car, directly behind the driver's seat, the officers recovered the gun Dodd used to rob the bank. Also recovered on the rear floor of the back seat was a black leather jacket. Inside the left interior pocket of the jacket was $2,360.00 in cash. Five of the bills were bait bills from the Superior Bank. Also inside the leather jacket was an envelope containing paperwork, including a birth certificate for James Dodd. (Tr. Vol. 1, p. 72-80, 87-88, Vol. 2, p. 103-106). After his arrest, Petitioner Montana was transported to the Dirksen Federal Building. Petitioner Montana stated that he was in the Jewel-Osco parking lot with the hood up on the car and that he was approached by two men whom he did not know. One of the men pointed a gun at him and forced him to get into his vehicle and drive away. (Tr. Vol. 2, p. 145-147). Petitioner Montana admitted that he drove

Dodd over to the Jewel-Osco parking lot. Petitioner Montana said that his car was starting to malfunction so he pulled over into the Jewel lot and popped the hood. Dodd left and then returned, telling Petitioner Montana to drive away. Petitioner Montana drove the car and Dodd rode in the back seat. Petitioner Montana said that he asked Dodd what was wrong. Petitioner Montana said he wanted to pull over, but Dodd told him not to stop. (Tr. Vol. 2, p. 145-149). Dodd testified that Petitioner Montana was innocent of the charged offenses. (Tr. Vol. 2, p. 182-191).

After the government and defense had rested, the government sought to reopen its case. (Tr. Vol. 2, p. 153-155, Tr. Vol. 3, p. 228-230). Over Petitioner Montana's objection, one of the deputy United States Marshal providing courtroom security testified that at approximately 10:00 a.m. on the previous day, he heard Dodd make a statement while Mr. Dodd was in the United States Marshal's lockup and while Dodd was in the general area of defendant Montana's cell as follows: "Let him know its going to be $10,000.00 and he had said let—either, let your father know or let him know that its going to be $10,000.00." This testimony was followed by a stipulation in which trial counsel for Petitioner Montana stipulated that James Dodd passed a note to Petitioner Montana's mother on the second day of trial. (Tr. Vol. 3, p. 237-239). Unbeknownst to the Petitioner, Petitioner's counsel had informed the government of the existence of the note, had informed the government, that he, Petitioner's counsel, had passed the note from Dodd to Petitioner's mother and Petitioner's counsel had informed the government of the alleged contents of the note. Further, unbeknownst

to Petitioner, Petitioner's counsel called the trial court judge at home and had a conversation outside the presence of a court reporter regarding the fact that Petitioner's counsel had conveyed the note from Dodd to Mrs. Montana. (Tr. Vol. 2, p. 232-233).

REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals for the Seventh Circuit is in conflict with decisions of the United States Courts of Appeals for the Eleventh and Second Circuits.

Petitioner contended on appeal to the Court of Appeals that the fact that Petitioner's trial counsel involved himself, unbeknownst to Petitioner, in an alleged scheme to bribe a witness and then revealed what he, trial counsel, had done to the prosecutors and to the trial judge by calling the trial judge at home established a conflict of interest with trial counsel's representation of Petitioner. The situation was further exacerbated by the fact the prosecution put before the jury evidence regarding the note which the prosecution had learned from Petitioner's trial counsel. Obviously, trial counsel was protecting his own interest by cooperating with the authorities to demonstrate his, trial counsel's, lack of knowing involvement in an alleged bribery scheme. The United States Court of Appeals for the Seventh Circuit stated in reliance on its previous decisions that "[t]he mere fact of being under investigation by the prosecutors of the lawyer's client does not create a fatal conflict, we have held" (citations omitted). The Court of Appeals for the Seventh Circuit indicated that the only decision contrary to the Seventh

Circuit's position was the Eleventh Circuit's decision in *United States v. McLain*, 823 F.2d 1457, 1464 (11th Cir. 1987). However, the Seventh Circuit Court of Appeals went on to state that the Eleventh Circuit's decision in *McLain* was rendered "defunct" by a subsequent Eleventh Circuit decision in *United States v. Watson*, 866 F.2d 381, 385 n. 3 (11th Cir. 1989).

An examination of *McLain* indicates that the Eleventh Circuit clearly held that where a client's attorney is under investigation by the same prosecutor who is prosecuting the client, there is a fatal conflict of interest. *McLain* at 1464. The Eleventh Circuit did not in *Watson* indicate that the *McLain* conflict principal was in any way "definct". In fact, the *McLain* conflict principal was reaffirmed by the Eleventh Circuit Court of Appeals in *United States v. Register*, 182 F.3d 820, 823 (11th Cir. 1999) and adopted by the Second Circuit Court of Appeals in *United States v. Fulton*, 5 F.3d 605, 609 (2nd Cir. 1993). Therefore, the position of the Seventh Circuit Court of Appeals is contrary to two other federal courts of appeals.

The implication of this conflict is the following: In the Second and Eleventh Circuits, once a defendant establishes that an attorney has an actual conflict of interest such as the conflict between Petitioner and his trial counsel, and there is no waiver or consent, the prejudice requirement of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) is presumed. In the Seventh Circuit Court of Appeals, the fact that a client's attorney has allegedly involved himself in a bribery scheme and has attempted to exonerate himself at the expense of his client by providing information ad-

verse to the client to the prosecutor who is prosecuting his client, is not a situation presenting a fatal conflict of interest. The rule enunciated by the Seventh Circuit Court of Appeals has created a conflict among the Circuit Courts of Appeals and is in conflict with this court's decision in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

CONCLUSION

For all the foregoing reasons, the Petitioner respectfully prays that this Honorable Court grant the instant petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

PHILLIP A. TURNER, ESQ.
200 West Madison Street
Suite 440
Chicago, Illinois 60606
(312) 899-0009

Counsel of Record for Petitioner